BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICK L. HEUBACH Claimant	)	
VS.	)	
NATIONAL PLASTICS COLOR INC. Respondent	)	Docket No. 1,006,207
AND	)	
LIBERTY MUTUAL INS. COMPANY Insurance Carrier	)	

ORDER

Claimant requested review of the December 22, 2003 Award by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) placed this matter on the summary docket for immediate disposition and the case was deemed submitted on March 2, 2003.

APPEARANCES

Robert R. Lee, of Wichita, Kansas, appeared for the claimant. Michael Streit, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 5 percent whole body functional impairment as a result of his work-related injury. The ALJ declined, however, to award additional compensation for work disability. According to the ALJ, claimant was terminated from his job because he failed to show up for work on three consecutive days as directed by his employer. In other words, claimant failed to exercise good faith to retain employment.

Claimant appealed this decision arguing his termination was improper and that the greater weight of the evidence supports his claim for work disability benefits. Claimant contends he has yet to obtain comparable employment as the restrictions imposed by Drs. Jane Drazek and Pedro Murati limit his employment opportunities.

Respondent argues the ALJ's Award is appropriate and should be affirmed. Claimant was told his work schedule would change and because claimant elected not to report to work as directed on three consecutive days, he was terminated. Thus, respondent maintains claimant's recovery is limited to a functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts of this case were succinctly presented in the Award and they will not be repeated except as necessary.

Based upon the contents of the parties' briefs, it appears neither party contests the portion of the ALJ's Award that assigns a 5 percent permanent partial impairment. Rather, the issue to be addressed on appeal is whether claimant is entitled to permanent partial general disability, more commonly referred to as work disability, under K.S.A. 44-510e.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e (Furse 2000).

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[1]

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[1] K.S.A. 44-510e (Furse 2000); *Pruter v. Larned State Hospital*, 28 Kan. App. 2d 302, 16 P.3d 975 (2000), *aff'd* 271 Kan. 865, 26 P.3d 666 (2001); *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

But that statute must be read in light of *Foulk*[2]and *Copeland*.[3] In *Foulk*, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e(a), the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . .[4]

The Kansas Appellate Courts have further interpreted K.S.A. 44-510e to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[5] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[6] Likewise, employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[7]

Claimant concedes he was working his normal night shift at accommodated duty on September 2, 2002 when he was told by Bill Roberts, the human resources director, that he was being reassigned to the day shift. Claimant further admits he was directed to report for work at 8:00 a.m. on Tuesday morning. Claimant was unhappy about this reassignment. According to Bill Roberts, the reason for this change in assignment was two-fold. There had been some difficulties on the night shift between claimant, a few of

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] Id. at 320.

[5] *Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999); *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[6] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[7] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

his co-workers and a newly promoted lead man. Additionally, claimant and another employee required light duty and it was easier for respondent to accommodate their restrictions during the day shift.

Later that same Monday, claimant called Bill Roberts at home. During this first phone call, both claimant and Mr. Roberts agree claimant expressed his displeasure at being reassigned. Claimant wanted advance notice of his reassignment. Claimant maintains that moving to the day shift beginning Tuesday September 3 would give him only 24 hours off from work. Both claimant and Mr. Roberts testified that at the conclusion of this phone conversation, claimant was told in no uncertain terms that he needed to report to work on Tuesday morning at 8:00 a.m.

Claimant then called Mr. Roberts a second time on Monday. He again expressed his frustration at his transfer. Claimant testified that Mr. Roberts relented and told him to go ahead and report to work on Friday at 6:00 p.m., his normal day and time for work and the two would discuss the transfer. Mr. Roberts denies this. He says he did not tell claimant he could ignore the prior directive about working on the day shift. Moreover, he specifically told claimant that he would likely be fired if he failed to appear for work on Tuesday, September 3, 2002.

Claimant did not report for work on Tuesday, September 3rd, nor did he report on Wednesday the 4th or Thursday the 5th. He reported for work shortly before his 6:00 p.m. shift on Friday, September 6, 2002. When he appeared for work, he was terminated. Claimant was not the only employee to be terminated at this point in time for failing to comply with the employer's directives and/or insubordination.

The ALJ found the claimant did not make a good faith effort to maintain his employment with respondent. He specifically concluded "[c]laimant was terminated for conduct unrelated to his Workers Compensation claim and he is not entitled to a work disability."[8]

Under these facts and circumstances, the Board finds no reason to disturb the ALJ's decision. Claimant failed to demonstrate good faith in maintaining his employment with respondent. Claimant was told to report for work on Tuesday, September 3, 2002. Although he complains that he was not given sufficient notice in advance of the transfer, the Board believes the 24 hour turn around is not outside the realm of reason. Respondent was making an effort to accommodate claimant's restrictions while also addressing an insubordination issue. The Board finds nothing in respondent's behavior that indicates bad faith. To the contrary, the Board finds that claimant was told at least two times that he was reassigned to the day shift and was expected to begin work on Tuesday morning at 8:00 a.m. Claimant's repeated attempts to persuade Bill Roberts to change his mind do not alter

[8] ALJ Award at 3.

this conclusion nor is claimant's version of the second phone call credible in light of Mr. Robert's testimony and the surrounding facts. Claimant was expected to report for work on Tuesday, September 3, 2002. He failed to do so and was terminated. As such, he is not entitled to work disability benefits.

The ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated December 22, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert E. Lee, Attorney for Claimant
Michael Streit, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director